Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Harold E. Constant,

Respondent,

v.

Spartanburg Steel Products, Inc.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Were the corporate Defendant's due process rights violated because on the Motion to Sequester Witnesses the trial court also excluded from the courtroom the designated representative of the corporate Defendant who was to assist counsel in the defense of the case?

PARTIES TO THE PROCEEDING

Spartanburg Steel Products, Inc. is a wholly owned subsidiary of SSP, Inc.

SSP, Inc. is a wholly owned subsidiary of Brenlin Corporation.

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United States v. Gagnon,
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United States v. Sorrentino,
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Waller v. Georgia,
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17 Halsbury's Laws of England ¶ 270, p. 188
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10 James W. Moore & Helen I. Bendix,
Moore's Federal Practice § 615.02
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Note, The Right to Counsel in Civil Litigation,
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Stephen A. Saltzberg & Kenneth R. Redden,
Federal Rules of Evidence Manual
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6 John H. Wigmore,
Evidence in Trials at Common Law § 1837,
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PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Spartanburg Steel Products, Inc. petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court. The decision allows a trial court to exclude a party from the courtroom in violation of that party's due process rights when on a motion to sequester witnesses the trial court also excludes the designated representative of a corporate Defendant who was to assist counsel in the defense of the case. This violates the corporate Defendant's fundamental due process rights to be present during trial, to confront witnesses, and to assist in its own defense.

PREVIOUS ORDERS AND OPINIONS

The decision of the South Carolina Supreme Court is printed in the Appendix, (App. 1-6).

The decision in the Court of Common Pleas for Spartanburg County, State of South Carolina is unpublished. Harold E. Constant v. Spartanburg Steel Products, Inc., C/A No. 91-CP-42-201, filed November 25, 1992. (App. 7-9).

STATEMENT OF JURISDICTION

The South Carolina Supreme Court's decision was filed on July 5, 1994. (App. 1-6).

The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const. amend. XIV, § 1.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. THE NATURE OF THIS CASE INVOLVING THE RIGHT OF A CORPORATE PARTY TO BE PRESENT AT TRIAL

A. The Case and The Facts

1. The Welder Which Was Missing From Spartanburg Steel's Plant

This is a slander action which arises out of an internal investigation of a welder's removal from the premises of Spartanburg Steel. Maurice Salmon, Safety and Security Manager for Spartanburg Steel, conducted the investigation. Harold Constant, an employee of Spartanburg Steel at the time, removed at least one welder from the premises of Spartanburg Steel. Harold Constant did this with the help of Jesse Videtto. Videtto was an employee of Compleat Machine Works, a vendor to Spartanburg Steel. Spartanburg Steel had reason to believe Constant and Videtto took a welder which belonged to Clarkson Industrial.

Reports from three security guards and various other Spartanburg Steel employees established that a welder was moved to a remote spot on the plant premises. The welder had a sign on it indicating that it belonged to "Clarkson", a contractor who had done work in the Spartanburg Steel plant. Later, someone spray painted over the "Clarkson" sign. Several Spartanburg Steel employees thought this was suspicious and that somebody might take the welder. One of them recorded the serial number of the welder after seeing it in this condition. Another took the breather cap off the welder

and scratched a mark in it so he could later identify it if the welder was taken. The security guards were alerted at the gate. These events were noticed on a Friday and Saturday, July 27 and July 28, 1990.

On Sunday morning, July 29, 1990, a day that normally both Compleat Machine Works and Spartanburg Steel plants were not in operation, Jesse Videtto of Compleat Machine Works came over to see Harold Constant at Spartanburg Steel. Harold Constant loaded a welder onto Jesse Videtto's truck and authorized the security guard to let the truck with the welder pass through the security gate. The "Clarkson" welder, with its fresh paint, marked breather cap, and recorded serial number was never seen again at the plant or otherwise. Constant and Videtto denied knowledge of the Clarkson welder and claimed they removed a different welder that belonged to Videtto's employer, Compleat Machine Works.

2. Maurice Salmon's Investigation of the Missing Welder

As soon as this and other information was reported to Maurice Salmon on Monday morning, he began to investigate. He first spent a week interviewing the Spartanburg Steel guards and employees and investigating the disappearance of the welder through other sources. This investigation included going to the owner of Compleat Machine Works and talking to him about his employee and Spartanburg Steel's employee removing a welder from the Spartanburg Steel premises.

3. The Accusation That Salmon Slandered the Plaintiff

The Plaintiff, Harold Constant, alleges that Maurice Salmon accused him of stealing the welder during this investigative visit to the owner of Compleat Machine Works.

Spartanburg Steel, through Maurice Salmon, denied accusing Constant of stealing a welder and also asserted a qualified privilege in conducting the investigation.

B. Maurice Salmon - The Designated Corporate Representative and His Role in the Case

Maurice Salmon was the Spartanburg Steel employee who conducted the investigation. He was a 50-year employee who held the office of Safety and Security Manager for Spartanburg Steel. Salmon is the person who was accused of slandering the Plaintiff. Salmon is the person through whom Spartanburg Steel was held vicariously liable for substantial punitive and actual damages.

Maurice Salmon was the person most intimately familiar with the case and best able to assist in the defense. By the time of trial, he had just retired from Spartanburg Steel. He was the very person who was accused of the acts which form the basis of the lawsuit. He could have been a named defendant in the case had the Plaintiff so elected. He is the person whose acts are alleged in the complaint. He is the target of the litigation and is the person who most embodies Spartanburg Steel in this case.

C. The Exclusion of Salmon, the Corporate Defendant's Designated Representative, From the Courtroom

The trial judge excluded Maurice Salmon from the courtroom. Spartanburg Steel then participated in virtually the entire trial without its designated representative to assist in its defense. Salmon only returned to the courtroom as Spartanburg Steel's final witness.

In contrast, the individual Plaintiff, who also testified as the initial witness in his case-in-chief, remained in the courtroom for the entire trial. The Plaintiff heard all of the witnesses and then testified in rebuttal at the close of the case.

After a week-long trial against a corporate Defendant who was tried in abstentia with its designated representative excluded from the courtroom, the jury returned a substantial verdict of punitive damages and actual damages.

The right of Spartanburg Steel to have its designated representative present was raised at the time of the decision by the Trial Judge, in a post-trial motion and in brief to the South Carolina Supreme Court.

The South Carolina Supreme Court simply treated this case as an exercise of discretion by the trial court in sequestering witnesses and refused to recognize the due process right of the corporate party to be present in the courtroom through its designated representative. Constitutional rights cannot be set aside or ignored by the exercise of discretion. Spartanburg Steel seeks a reversal and a new trial on the grounds

that fundamental fairness, as embodied in due process of law, entitles Spartanburg Steel to have its designated representative in the courtroom during the trial of a case in the same way that an individual litigant has the right to be present when witnesses are sequestered.

II. A PARTY HAS THE RIGHT TO BE PRESENT AT TRIAL AS A PART OF DUE PROCESS

Although the right to be present at trial is a fundamental one, it has been necessary for the law to continue to recognize and protect it. Examples of this protection run from early decisions in the midwest to very recent decisions in New Jersey. For example, in Larue v. Russell, 26 Ind. 386, 387 (1866), the Court said:

> The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and is so obviously necessary for the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the denial of this privilege.

This right was recognized by the same court with the same language a few years later in the context of a party in a representative capacity being excluded when witnesses were sequestered. Cottrell v. Cottrell, 81 Ind. 87 (1881).

In the present case, Maurice Salmon was the representative of Spartanburg Steel for purposes of imposing liability; Spartanburg Steel chose him as its

representative. His presence in court was as important as if the case was against him individually.

This right of a party to remain present at trial when witnesses are sequestered has been recognized and preserved in other venues of the common law. Professor Wigmore in tracing the rule points out that in Charnock v. Dewings, 3 Car. & K. 378 175 Eng. Rep. 597 (1853), the trial court required the witnesses on both sides to leave the court including the defendants themselves. 6 John H. Wigmore, Evidence in Trials at Common Law § 1841, p. 477 n. 10 (J. Chadbourn Rev. 1976). The court held that "on constitutional grounds, he had no authority to order the defendants to leave the Court as long as they behaved with propriety." This is still the rule in England that the parties may not be ordered to leave the court under a judge's discretionary authority to exclude witnesses. 17 Halsbury's Laws of England ¶ 270, p. 188 (4th ed. 1976).

A. The Right to Confront Witnesses is a Part of the Right to be Present at Trial

The confrontation clause of the Sixth Amendment is a part of the right of a criminal defendant to be present at every stage of trial and is applicable to the states through the Fourteenth Amendment. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). One purpose of the right to confront witnesses is to give a defendant an adequate opportunity to cross examine. Another purpose is to give the jury an opportunity to observe the witness's demeanor while that witness is in the presence of and confronted by the defendant.

In this case, the Plaintiff and the chief accuser did not have to look Maurice Salmon in the eye while accusing him of slanderous statements, nor did the jury have this truth-testing tool.

The right to be present finds roots in the confrontation clause of the Sixth Amendment, but it is protected also by the due process clause in situations where the defendant is not actually confronting witnesses. United States v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); United States v. Bifield, 702 F.2d 342 (2d Cir.), cert. denied, 461 U.S. 931 (1983).

The right to be present throughout a trial must be interpreted in light of the right to defend and be heard as well as the more limited issue of confronting witnesses. It is an ancient and well-established right which draws on several constitutional sources. Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978). The right to be present is almost as important to an accused as the right of trial itself. Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884); Diaz v. United States, 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500 (1912).

There is a paucity of authority regarding the right to be present in civil cases just as there is regarding the right to counsel. This fact is due in part to its historical development. Since English law had already recognized the right to retain civil counsel, the American Constitution did not need to reaffirm it. It was already generally assumed. Likewise, the right to be present at trial in civil cases was a presumed constitutional right in the American legal system developing out of the principle that notice and hearing are basic elements of due process of law.

While there are no civil cases on point, the Supreme Court has indicated in criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. See, e.g., Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Cooke v. United States, 267 U.S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767 (1925); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1117 (5th Cir.), cert. denied, 449 U.S. 820 (1980); Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322, 1329 (1966).

The right to be present has been recognized in Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81, 39 S. Ct. 435, 436, 63 L. Ed. 853 (1919), where the Court said:

> We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering a verdict.

A number of jurisdictions have recognized that the fundamental constitutional right of a person to have a jury trial in certain civil cases includes the ancillary right to be present at all stages of such a trial except the deliberations of the jury. Carlisle v. County of Nassau, 64 A.D.2d 15, 408 N.Y.S.2d 114 (1978). See also Leonards of Plainfield, Inc. v. Dybas, 130 N.J.L. 135, 31 A.2d 496 (1943).

This right has also been recognized on behalf of a corporation. Courts have held that an officer of a

corporation whose testimony was important would not be excluded as a witness under a statute because the party's presence through the corporate representative was a requirement overriding the need to sequester witnesses. Lenoir Car Co. v. Smith, 100 Tenn. 127, 42 S.W. 879 (1897).

It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881, n. 9, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985).

There are a number of reasons why parties need to be present to assist in their own cause or defense. Decisions are continually made during the course of a trial as to who should be called as the next witness, what to ask on cross-examination, whether to call a particular witness, whether to object to some evidence or procedure, whether to acknowledge an expert's qualifications, whether to stipulate to something, whether to pursue inquiry along lines not fully explored earlier, whether to entertain settlement negotiations during the trial. Some of these are set out in Geders v. United States, 425 U.S. 80, 88, 96 S. Ct. 1330, 1335, 47 L. Ed. 2d 592 (1976).

As the Court observed in United States v. Mosquera, 816 F.Supp. 168, 175 (E.D.N.Y. 1993): "Defense counsel loses a valuable resource if his or her client cannot understand the charge and supporting facts. Significance of detailed factual representations may escape the lawyer, but not the client who is familiar with the circumstances surrounding his case."

In the present case, Maurice Salmon had conducted all of the investigation on behalf of Spartanburg Steel before there was ever a lawsuit. He alone possessed the most comprehensive exposure to this information. He is the person that defense counsel wanted as a resource in the courtroom. Maurice Salmon would best be able to assist in making decisions about the sequence of witnesses, things to ask on cross-examination or on direct, whether to call someone, whether to object and what lines to pursue.

Maurice Salmon, more than defense counsel, would know the significance of detailed factual representations because he was familiar with the circumstances surrounding the case. Maurice Salmon acted on behalf of the party, Spartanburg Steel, during the events which gave rise to the cause of action. If Spartanburg Steel is allowed to participate meaningfully in its own defense and assist its counsel, then Maurice Salmon is the person to undertake the task.

Not having the Defendant present was the loss of the defense's most valuable resource -- the very individual who could provide it the most meaningful assistance.

B. <u>Related Rights Which Stem From the Right to be Present at Trial</u>

There are a number of rights which have been recognized as basic to due process which presume the right to be present as a condition necessary and precedent to other rights.

1. Right to Assistance of Counsel Cases

The right to court-appointed counsel was established in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). In recognizing Clarence Earl Gideon's right to trial, the court observed that Gideon conducted his defense well for a layman. Certainly, Gideon was allowed to be present even by the Florida courts who at the time did not allow him to have counsel. While Gideon was entitled to the assistance of counsel, it would seem to go without saying that counsel was entitled to the assistance of Gideon.

There is no constitutionally recognized right to have court-appointed counsel in a civil case. A civil litigant may have to proceed pro se. If there is no right to counsel and there is no right to be present at trial, then an unsolvable dilemma would arise when witnesses were to be sequestered. The party would have to leave and there would be no lawyer remaining in the courtroom to handle the case.

2. The Right to be Physically Present, Competent and to Understand

Individual incompetents are not even subject to trial in the criminal courts. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Part of the rationale is that an incompetent defendant cannot be present in any meaningful way to assist counsel in their own defense.

Even the limited purpose of confrontation of witnesses has as essential requisites the requirements of physical presence, competency, and ability to understand the language of the forum -- through an interpreter if

necessary. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 23.2, at p. 874 (West 1985).

Not only must there be physical presence, but a party must be present in a meaningful way to assist counsel.

Spartanburg Steel did not have present the representative who was competent to understand the trial and help counsel defend the case.

3. **Right to Confront Witnesses**

The Sixth Amendment right of a defendant to confront witnesses has already been discussed above but it is worth observing here that it is a component of the right to be present and that the right to be present is a necessary condition for the exercise of the right to confront witnesses.

4. **Right of a Party, the Press, and the Public of Access to Trials**

Through open trials, a defendant is given protection against the possible abuse of judicial process and the arbitrary use of judicial power. This right of public trial is in a broad sense for the protection of the public generally but in a special sense is a privilege to the individual members of the public who must defend themselves. United States v. Sorrentino, 175 F.2d 721, 722-23 (3rd Cir.), cert. denied, 338 U.S. 868 (1949); State v. Pullen, 266 A.2d 222, 228 (Me. 1970), overruled on other grounds, State v. Brewer, 505 A.2d 774 (Me. 1985).

The right to be at trial is extended not only to protect the integrity and reliability of the trial procedure

but also to maintain the confidence of the parties and the public in courts as instruments of justice. Badger v. Cardwell, 587 F.2d 968, 978 (9th Cir. 1978).

It is not hard to imagine the lack of confidence that Spartanburg Steel has in this state trial court as an instrument of justice. Spartanburg Steel was not at its own trial. Its designated representative, Maurice Salmon, was excluded from the courtroom shortly after the beginning of the Plaintiff's first witness and stayed out of the courtroom until his own testimony as the concluding witness for the defense. This took place over a period of five days and approximately 29 witnesses for both sides as well as during numerous motions and rulings by the trial court.

Spartanburg Steel confronted no witnesses. Spartanburg Steel provided no assistance or help to trial counsel in making strategy decisions during the course of the trial. Spartanburg Steel did not get to do anything more than be sequestered as a witness.

On the other hand, the same treatment was not given to the individual Plaintiff who testified as a witness, remained in the courtroom for the entire trial, consulted with and assisted his attorney, and then testified as a witness again at the close of the case after being present for the entire proceedings.

Trying to explain to a client how this can happen is an unrewarding undertaking. Whatever benefit may be served by giving confidence to the general public in open trials should apply with particular force to the parties.

Spartanburg Steel was accused of having made slanderous statements through the voice of its employee, Maurice Salmon. This accusation resulted in a verdict of $100,000.00 punitive damages and $400,000.00 actual damages against Spartanburg Steel by one of its former employees. To have a week spent in trial with the accuser being present in the courtroom with the judge and the jury while the Defendant who has been hailed into court but now thrown out of the courtroom inspires no confidence that justice has been done.

This is not just a matter of the perception of laypersons. It is just as devastating to counsel as it is to the client to have the party whose cause is being pursued excluded from the proceedings.

Spartanburg Steel employed Maurice Salmon for 50 years to help it with security. It was being sued because of an alleged statement Mr. Salmon made while performing his duties as the manager in charge of security. It needed Mr. Salmon to be in court with its attorneys working on the case.

III. A CORPORATE PARTY IS ENTITLED TO DUE PROCESS INCLUDING THE RIGHT TO BE PRESENT AT TRIAL JUST AS AN INDIVIDUAL PARTY

A. For Any Party the Right to be Present at Trial Takes Precedence Over the Sequestration of Witnesses

This case involves a conflict between two basic features of a trial, both ancient and fundamental, but one is overriding. The conflict is between the right to be

present at one's own trial and the right to sequester witnesses. As Professor Wigmore and others have pointed out, the principle of sequestering witnesses can be traced back at least to the apocryphal story of Daniel's effective cross-examination of the elders who traduced Susanna. 6 Wigmore, Evidence § 1837, at 455. However, as Professor Wigmore also indicates, the rule on sequestering witnesses is not in itself older or more widespread than some other fundamental notions of proof. What goes without saying is that Susanna's right to be present at her own trial was presumed and already established.

1. **The Individual Plaintiff in This Case was Allowed to be Present When Other Witnesses Were Sequestered**

The Trial Court instinctively recognized the right of the individual Plaintiff as an exception to sequestering witnesses. In fact, it was so presumed that there was no discussion at trial about the individual Plaintiff's right to take the stand as a witness, remain in the courtroom throughout the entire proceedings, and take the stand as a witness again in rebuttal. It was only the corporate party's designated representative who was excluded.

2. **Substituting Someone Who Knows Nothing of the Case is not a Solution**

The Trial Court offered and the Plaintiff urged that Spartanburg Steel could have solved its problem by having the company president physically in the courtroom. The theory is that such a person would nominally fulfill the requirement of having a party be present so that there would be no "empty chair".

This ignores the reality of the need to have the party present in the courtroom in a meaningful way to assist counsel. To simply put a warm body in a chair at counsel table provides no help to counsel and provides no meaningful presence.

If this were all that were required, it could be applied easily and equally to individual parties. It would be a simple matter for the court to appoint a guardian ad litem or next friend for an individual party and then sequester them from the courtroom. That could have been done in the present case. The Plaintiff's wife, or adult children, could have stayed in the courtroom as his representative. Or, for that matter, the Court could have excluded Harold Constant just as it excluded Maurice Salmon and there be no one in the courtroom for the Plaintiff or the Defendant. The lawyers could simply try the case and the parties who were also witnesses could all stay out of the courtroom.

B. Analogy from Federal Rule of Evidence 615

Federal Rule of Evidence 615 does not permit the exclusion of an attorney's designated representative of a corporate party. 10 James W. Moore & Helen I. Bendix, Moore's Federal Practice § 615.02 (2d ed. 1994). The right of a corporate party to be present at trial through its designated representative is as important and as fundamental as an individual's right to be present. Fed. R. Evid. 615(2) advisory committee's note. The exclusion of parties, whether natural persons or corporations, would raise serious confrontation and due process problems. 6 Wigmore, Evidence § 1841; see also Stephen A. Saltzberg & Kenneth R. Redden, Federal Rules of Evidence Manual 437 (3d ed. 1982).

Since the Federal Rules of Evidence protect the right of a corporation's designated representative to be present as an exception to the sequestration of witnesses rule, the issue in the federal courts is almost always decided under the rule rather than arising to the level of a due process question under the Constitution.

Some states have adopted a parallel rule to the federal rule which also recognizes this right without resort to the Constitution. Clearly, the rules are embodying the constitutional right.

C. **State Court Decisions on the Right of a Party to be Present at Trial in Conflict with Sequestering Witnesses**

In some jurisdictions, this right of a corporate representative to be present has been recognized. In Queen v. Washington Metro. Area Transit Auth., 842 F.2d 476 (D.C. Cir. 1988), the court held the corporate defendant's bus driver who had been designated as its representative was not subject to sequestration. See also Nanoski v. General Motors Acceptance Corp., 874 F.2d 529 (8th Cir. 1989). The Arkansas Court of Appeals has recognized it in Dyson v. Ferncliff Properties, Inc., 16 Ark. App. 64, 696 S.W.2d 767, 770 (1985), and said:

> The sequestration or exclusion of witnesses is employed to expose inconsistencies in testimony and to prevent the possibility of one witness molding his or her testimony to that given by other witnesses at trial. (Citations omitted.) The Rule, however, provides certain exceptions. It does not authorize the removal of (1) a party who is a natural

> person or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Other courts have also affirmed the right of a party to be present as an exception to the rule of sequestration. Martin v. Burcham, 203 S.W.2d 807 (Tex. Civ. App. 1947); Jefferson-Western Corp. v. Chefas, 670 P.2d 431 (Colo. Ct. App. 1983); Tant v. Women's Clinic, 412 So.2d 274 (Ala. 1982).

D. The Corporation gets to Choose its Designee -- Not the Adversary or the Trial Judge

The South Carolina Supreme Court simply said that Maurice Salmon had retired prior to trial and that he was no longer a corporate employee and therefore no issue was presented. The trial judge did not use this rationale. Furthermore, the constitutional right is not restricted to someone who is an employee at the time of trial.

Maurice Salmon was an employee at the time the cause of action arose. He was a sufficient representative of Spartanburg Steel to impose artificial legal liability upon it through vicarious liability. If Maurice Salmon commits an act while he is an employee of Spartanburg Steel, that act is imputed to Spartanburg Steel for purposes of liability. It is hard to imagine a more appropriate designated representative to then be present in the courtroom. It should be the party who chooses its own representative and not its adversary or the court.

The right of a corporation to have its designated representative in the courtroom means the representative the corporation chooses. If the corporation cannot choose who will be present, then the right has no meaning. To exclude the representative who really can be of assistance because that representative knows the case and substitute in lieu thereof someone who simply wears the label of the corporation would be the same thing as excluding an individual party and designating a nominee who knows nothing about the case to sit in with counsel. The person the corporation thinks best embodies itself in terms of the case being litigated should be the corporate presence.

It is the corporation who designates its representative, not someone else. In Safeway Stores, Inc. v. Watson, 317 Md. 178, 562 A.2d 1242 (1989), the trial judge felt that Safeway could only name an officer or employee as its designated representative when Safeway wanted to appoint a claims adjuster for a company employed by Safeway to adjust workers' compensation claims. The Maryland court did not require that the designated representative be a direct employee of Safeway and allowed Safeway to choose saying:

> The language and history of Rule 2-513 make it clear that a party that is not a natural person has very broad latitude in the selection of a representative when witnesses are excluded, and the exercise of this right is not subject to the discretion of the trial judge. We need not decide here whether Safeway could have gone to central casting for the selection of its

> representative. Scheck, who was an employee of a firm under contract with Safeway to investigate and adjust worker's compensation claims filed against Safeway, and who had been assigned to this case from its inception, was eligible to be designated by Safeway as its representative under either interpretation of the Rule.

Id. at 1245.

In the present case, Maurice Salmon had been an employee of Spartanburg Steel for approximately 50 years. It was his job to manage security for the plant. It was his assignment to investigate the loss of the welding machine. It was Maurice Salmon doing his job that resulted in this lawsuit. It was Maurice Salmon who made the statements which are the subject of the Plaintiff's complaint. He should be eligible to be designated by Spartanburg Steel as its representative.

There is more to having a designated representative present in the courtroom than simply avoiding the empty chair. The Maryland court said in Bobbitt v. Allied-Signal, Inc., 334 Md. 347, 639 A.2d 142, 146 (1994): "In addition to the benefit of 'humanizing' a corporate defendant in a jury trial, this Court noted the advantage of the presence of the principal investigator for purposes of evaluating the case and to participate in tactical decisions that must be made during the course of a trial."

In the present case, in addition to humanizing Spartanburg Steel, Maurice Salmon was also the principal investigator for Spartanburg Steel and was the one most able to participate in tactical decisions that

would have to be made during the course of trial. In addition, he was the person most appropriate to constitute Spartanburg Steel's presence in confronting witnesses who were accusing it. Maurice Salmon on behalf of Spartanburg Steel should have been present during this week of trial.

E. South Carolina's Common Law Rule on Sequestering Witnesses Must Yield to the Due Process Right of a Corporation's Designated Representative to be Present

South Carolina does not have a rule which is the counterpart of Federal Rule of Evidence 615. South Carolina finds the authority to sequester witnesses in its common law. Payne v. Atlantic Greyhound Bus Lines, 182 S.C. 58, 188 S.E. 426 (1936); State v. McElmurray, 34 S.C.L. (3 Strob.) 33 (1848); Anonymous, 19 S.C.L. (1 Hill) 251 (1833).

Since the common law rule itself does not recognize the constitutional right to be present but is simply a rule for sequestering witnesses, the court must give force to the constitutional right of a party to be present as an overriding principle higher in priority than the common law rule for sequestering witnesses.

This right to be present should be afforded to a corporation just as it is to an individual. It is not only the indigent who have constitutional rights but also those who work in plants and factories. These people often do their work through the corporate form. It is the most common means of organized commercial enterprise. When they must litigate through this corporate form, their rights should still be protected.

IV. THE IMPORTANCE OF THE RIGHT OF A CORPORATE DESIGNATED REPRESENTATIVE TO BE PRESENT AT TRIAL

A. This Conflict Between the Designated Corporate Representative's Right to be Present at Trial and the Need to Sequester Witnesses Arises With Great Frequency.

The very importance of the right to be at trial often coerces trial counsel to avoid preserving the issue. The risk of trying a case to a jury with no client can be devestating as it was here. Most trial attorneys who have any viable alternative will opt for discretion as the better part of valor and either choose some alternative corporate designee or forego the right to sequester witnesses.

Trial counsel in this case framed and preserved the issue as strongly as it can be put. The trial judge offered the option of designating the company president but counsel declined because the company president could not help with the case. The trial judge offered to change the order sequestering witnesses. Counsel declined saying the client did not have to give up the right to sequester witnesses in order to exercise the right to be present for trial.

This question will come up almost every time there is a need to sequester witnesses and one of the litigants is a corporation. It is in the nature of disputes that parties themselves are usually witnesses and corporations are no different. But it is rare that counsel has the fortitude to protect the record and try the case with no client in the courtroom.

B. **If the South Carolina Court's Decision Stands, the Sequestration of Witnesses Rule Will Become a Tool to Exclude Corporate Parties From the Courtroom.**

If the decision of the South Carolina Supreme Court stands, the tactical advantage will quickly be obvious to any trial lawyer representing individual parties.

All of the advantages of having the client in the courtroom to assist can be eliminated by asking the court to sequester witnesses and including within that net the corporation's designated representative.

Excluding Maurice Salmon from the courtroom not only dehumanized Spartanburg Steel, but it handcuffed defense counsel in a major way because they did not have the benefit of the best available person to assist in trying the case during the course of a full week of trial.

This was a large part of the Plaintiff's success in obtaining a substantial verdict for punitive and actual damages against a company that the jury never saw until the final witness and which was tried in absentia up until that time.

C. **When the New Jersey Court Recently Recognized the Constitutional Right of a Corporate Designated Representative to be Present, it Recognized the Importance of the Issue and Took the Extraordinary Step in its Opinion of Referring the Issue to the Civil Practice Committee to Consider Adopting a Rule to Protect the Right.**

The New Jersey court has recently met the same issue as the South Carolina court. New Jersey's sequestering witnesses rule is found in its common law and is not found in a procedural rule. In Morton Buildings, Inc. v. Rezultz, Inc., 127 N.J. 227, 603 A.2d 946 (1992), the New Jersey court confronted the question of whether the representative of a corporation may be excluded at trial from the courtroom pursuant to a witness sequestration order. The Court found that parties to a civil action should be exempted from sequestration because of their due process right to participate in the conduct of the case.

The Court held that an officer or employee of a corporation who is designated as the corporation's representative may not be sequestered. Although the sequestration in this case was found to be minor and harmless, the issue itself was found to be very significant and the Court took the unusual step in its opinion, saying:

> The matter is of sufficient importance for us to refer the matter to our Committee on Civil Practice for consideration of the adoption of a Rule like Federal Rule 615.

Id. at 950.

Just as the New Jersey court recognized the potential for a repetitive conflict between the right of a corporation to be present at its trial and the rule for sequestering witnesses, the federal system has also recognized the potential for the repetition of this by a specific provision in the Federal Rule 615 for sequestering witnesses.

In all states like South Carolina which have a common law source for the rule on sequestering witnesses, the party's protection of its right to be present is found in the due process clause of the constitution.

D. The Substantive Importance of the Right to be Present in a Civil Case

In Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), this Court recognized the importance to a criminal defendant of his right to confer with his counsel in spite of a sequestration order during a 17-hour recess in the trial between his direct and cross-examination. The Court held to the extent that a conflict remains between a defendant's right to confer with an attorney during an overnight recess and a prosecution's desire to sequester the witness to prevent coaching, the conflict must be resolved in favor of the right to the assistance and guidance of counsel.

In the follow up case which emerged from South Carolina, this Court has dealt even with a 15-minute recess sequestration order in the criminal case of Perry v. Leeke, 488 U.S. 272, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989). In Perry, this Court found that a showing of prejudice was not an essential component of a violation of the Geders rule in light of the fundamental

importance of the criminal defendant's constitutional right to be represented by counsel.

In order to protect this right to confer with counsel, two things must be protected. The client must have access to counsel. But, also, counsel must have access to the client.

In the present case, on the civil side of the court, Spartanburg Steel is not complaining about being prevented from being present during a 15-minute recess or even a 17-hour overnight break. Spartanburg Steel was kept out of the entire trial of the case until Maurice Salmon entered the courtroom as the concluding witness.

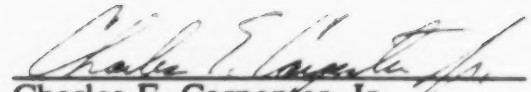
While this was not a criminal trial, Spartanburg Steel was being accused of slander and was at risk of substantial punitive and actual penalty which did in fact take place.

Spartanburg Steel has been assessed $100,000.00 punitive damages and $400,000.00 actual damages by the Court of Common Pleas of Spartanburg County, South Carolina as a result of a trial at which its designated representative was not even present.

It is important that this not happen in civil cases just as it is not allowed to happen in criminal cases.

CONCLUSION

This Court should issue a writ of certiorari to the South Carolina Supreme Court accepting this case for review in order to consider the right of a corporate defendant to be present at trial in the context of a witness sequestration rule.



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ATTORNEYS FOR PETITIONER

October 3, 1994.

APPENDIX

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Harold E. Constant, Respondent,

v.

Spartanburg Steel Products, Inc., Appellant.

Appeal From Spartanburg County
C. Victor Pyle, Jr., Judge

Opinion No. 24115
Heard May 3, 1994 - Filed July 5, 1994

AFFIRMED

Charles E. Carpenter, Jr. and Deborah L. Harrison, both of Richardson, Plowden, Grier & Howser, P.A., of Columbia; Wade E. Ballard and Roger G. Chandler, both of Edwards, Ballard, Bishop, Sturm, Clark & Keim, P.A., of Spartanburg; and David H. Wilkins, of Wilkins & Nelson, P.A., of Greenville, for appellant.

Edwin C. Haskell, III, of Smith & Haskell, of Spartanburg; A. Camden Lewis and Mary G. Lewis, both of Lewis Babcock & Hawkins, of Columbia, for respondent.

MOORE, A.J.: Respondent Harold Constant brought this defamation action against appellant Spartanburg Steel Products, Inc. (SS). The jury returned a verdict for respondent for $400,000.00 actual damages and $100,000.00 punitive damages. We affirm.

FACTS

SS fired respondent for failing to cooperate in its investigation of a missing welding machine. After independent contractors Clarkson Brothers, Inc. (Clarkson) and Compleat Machines (Compleat) finished working at SS, as was common practice, a welding machine was left on site. At respondent's direction, the machine was picked up from SS by a Compleat employee. When SS realized the machine had been removed from its property, it began an investigation concerning the removal of the machine. SS asserted the machine belonged to Clarkson. Despite repeated assurances from Clarkson that it was not missing a welding machine, SS continued its investigation during which it contacted the owner of Compleat and communicated respondent was a "thief" and had stolen the machine.

ISSUES

1) Did the trial court err in denying SS's motion for a directed verdict on the

ground of qualified privilege?

2) Did the trial court err in denying SS's motion for submitting interrogatories to the jury?

3) Did the trial court err in sequestering all of the witnesses?

4) Did the trial court err in allowing testimony of a lost job opportunity?

5) Did the trial court err in denying SS's motion for a new trial on the ground the verdict was excessive?

DISCUSSION

1) Directed Verdict Motion

SS contends the trial judge erred in denying its motion for directed verdict. SS made the motion on the ground the communication was qualifiedly privileged. A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable. Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 181 S.E.2d 325 (1971). The publisher must not wander beyond the scope of the occasion. Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981). One publishing under a qualified privilege is liable upon the proof of actual malice. Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights. It is

ordinarily for the jury to determine whether the privilege has been abused or exceeded. Id.

Here, SS continued its investigation and accused respondent of being a thief after learning Clarkson was not missing a welding machine. In fact, at trial Clarkson stated SS had repeatedly contacted it about a missing machine and refused to believe no machines were missing. A jury could find SS acted recklessly or with conscious disregard for respondent's rights when SS accused respondent of stealing a machine when it had knowledge Clarkson was not missing a machine. We find there was evidence from which the jury could find malice and the trial judge did not err in denying SS's motion for a directed verdict.

2) Interrogatories

SS contends the trial judge erred in denying its motion to submit a special verdict. We disagree. Rule 49 (b), SCRCP, states a trial judge may submit interrogatories to the jury. Whether a trial judge submits a special verdict or interrogatories is a matter of discretion. Smoak v. Liebherr-America, Inc., 281 S.C. 420, 315 S.E.2d 116 (1984); Love v. Oswald, 272 S.C. 347, 251 S.E.2d 766 (1979). We hold the trial judge did not abuse his discretion.

3) Sequestration

SS contends the trial judge erred in requiring the sequestration of Maurice Salmon, the SS employee who headed the investigation and stated respondent was a thief. At trial SS moved to have the witnesses sequestered. The trial judge granted the motion. Later SS asked the court to exclude Salmon from the

sequestration order. The trial judge refused but offered to lift the sequestration order or allow another person to be the corporate representative. SS refused.

Whether a witness should be exempted from a sequestration order is within the trial court's discretion. State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), overruled on other grounds, State v. Torrence, 305 S.C. 405, 406 S.E.2d 315 (1991). SS argues excluding Salmon was equivalent to excluding a party. Salmon, however, was not a party. SS then argues Salmon was the corporate representative. At the time of trial, however, Salmon was no longer employed by SS and, therefore, was not a proper corporate representative. Mississippi Rice Growers Ass'n v. Pigott, 191 S.2d 399 (Miss. 1966) (no error in sequestrating witness when he could not represent the corporation because he was no longer an officer). We hold the trial judge did not abuse his discretion in declining to exempt Salmon from the sequestration order.

4) Admission of testimony

SS argues the trial court erred in allowing respondent to present testimony of a job he would have been offered if not for being fired from SS. Respondent presented evidence of a neighbor who ran a cleaning service and would have offered him a job paying $36,000/year, but did not because of the rumors that respondent was a thief. An expert also testified as to respondent's economic loss from not receiving this job offer. SS argues this testimony was too speculative and the only evidence upon which the jury could have based an award of damages. However, this is a slander per se action and general damages need not be proven by respondent. Smith v. Phoenix Furniture Co., 339 F.Supp.

969 (D.S.C. 1972) (falsely accusing someone of a crime is slander per se and where slander per se is proven, damages are presumed). Further, the admission of evidence is within the discretion of the trial judge. Absent an abuse of this discretion, we will not reverse on appeal. Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989). We find the trial judge did not abuse his discretion in admitting this testimony.

5) Excessive verdict

SS argues the verdict was so excessive the trial judge should have granted it a new trial. When the amount of a verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside of the evidence, the trial judge must grant a new trial absolute. If the trial court does not, on appeal, this Court should. Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753 (1985). Prior to his termination, respondent, who was fifty-three years old, had worked for SS for ten years and received health insurance and other benefits. At the time of trial, respondent had been unable to find a permanent full-time job with benefits. We do not find the verdict grossly excessive and therefore decline to grant a new trial.

AFFIRMED.

HARWELL, C.J., CHANDLER, FINNEY and TOAL, JJ., concur.

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF SPARTANBURG
Common Pleas Court

Case No. 91-CP-42-201

Harold E. Constant VS.

Plaintiff(s)

Spartanburg Steel Products, Inc.
Defendant(s)

[X] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the verdict rendered.

[ ] Decision by court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] Action Dismissed. [ ] Rule 12(b), SCRCP [ ] Rule 40(c)(3), SCRCP [ ] Rule 41(a), SCRCP (Vol. Nonsuit) [ ] Settled [ ] Other, Explain:

IT IS ORDERED AND ADJUDGED: [ ] See attached order
[ ] Statement of Judgment by Court

We, the Jury, find for the Plaintiff:

Four Hundred Thousand ($400,000.00) Dollars actual damages;

and

One Hundred Thousand ($100,000.00) Dollars punitive damags.

FILED
November 25, 1992

Dated at Spartanburg, South Carolina, this 19 day of November, 1992.

C. Victor Pyle, Jr.
Judge

This judgment was entered on the 25 day of November, 1992, and a copy mailed first class this 25 day of November, 1992, to attorneys of record or to parties (when appearing pro se) as follows:

Edwin C. Haskell, III P.O. Box 5306 Spartanburg, SC 29304	Wade Edward Ballard Roger Chandler Thomas H. Keim, Jr. P.O. Box 5398 Spartanburg, SC 29304
Attorney(s) for Plaintiff(s)	Attorney(s) for Defendant(s)

Dianne Pennington

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Harold E. Constant, PLAINTIFF,	)	VERDICT
-VS-	)	CA No. 91-CP-42-201
Spartanburg Steel Products, Inc. DEFENDANT.	)	FILED November 25, 1992

I. WE, THE JURY, FIND FOR THE PLAINTIFF:

Four Hundred Thousand ($400,000) DOLLARS
ACTUAL DAMAGES

One Hundred Thousand ($100,000) DOLLARS
PUNITIVE DAMAGES

II. WE, THE JURY, FIND FOR THE DEFENDANT.

Joyce G. Ward
Foreperson

11-13, 1992

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE C. VICTOR PYLE, JUDGE
CIVIL ACTION NO. 91-CP-42-201

HAROLD E. CONSTANT, Plaintiff-**RESPONDENT**;

versus

SPARTANBURG STEEL PRODUCTS, INC.,
Defendant-**APPELLANT**.

STIPULATION

At the beginning of the trial, the Defendant asked the Court to sequester the witnesses. As the trial began and proceeded Maurice Salmon, the Defendant's designated corporate representative, remained in the courtroom to assist defense counsel and to represent the corporate defendant.

During the cross-examination of the Plaintiff, Plaintiff's counsel requested, over objection by defense counsel, that Maurice Salmon be excluded from the courtroom on the basis that Mr. Salmon was a witness in the case and no longer employed by the Defendant. The trial judge ordered that Maurice Salmon be excluded.

This transpired during the proceedings at Trial Transcript page 123, lines 1 through 4. At this point, the trial court excluded Maurice Salmon from the courtroom until he testified on behalf of the Defendant beginning at Trial Transcript page 700, line 1.

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Excerpts from Transcript of Trial
November 9 - 13, 1992

[Page 149, line 8, through page 151, line 17]:

THE COURT: . . . Anything before I bring the jury?

MR BALLARD: Yes, sir. I have one matter also. I would like to move that Your Honor reconsider his order yesterday that Mr. Moze Salmon, the corporate designee, be sequestered. Your Honor, I went back and did some research last night and I have some cases on this which I would like to hand up to the Court for its consideration. Our position is, Your Honor, that it's a violation of the corporation's due process rights to be deprived of---

THE COURT: Why can't you bring in the president of Spartanburg Steel and have him sitting in here?

MR BALLARD: Because, Your Honor, one of the reasons that it is important that a corporate representation be here during the course of a trial is to assist the attorneys. The corporate president doesn't know anything about this case. Moze Salmon is the only person who was in charge of the investigation out there at Spartanburg Steel.

The cases that I have given you from the DC circuit, the Supreme Court in New Jersey and from the Eighth Circuit have all said that an exception to the sequestration rule is the person the corporation wants to designate, whoever that it is. It is a due process

violation for the corporation not to be allowed to designate whoever they want to.

In the case of Queen vs. Washington Metropolitan Area Transit Authority from the DC circuit it was about a bus driver who had a wreck and the corporation designated the bus driver as the corporate witness to sit, and a corporate representative to sit, through trial. The plaintiff there tried to have it---

THE COURT: Mr. Haskell, what is your position?

MR. HASKELL: Your Honor, I think it would be highly prejudicial to require all of my witnesses to be sequestered and yet Mr. Salmon, the one witness in the case who we are alleging this slander, to sit in here and have the benefit of watching all of my witnesses testify and more or less prepare himself for his own testimony. I am having to fly blind in here with my witnesses and I think it would be manifestly unfair and prejudicial to me to have their primary witness sit and observe and require all of mine to be outside.

THE COURT: Yes, sir. I am not going to change my ruling. Anything else before I bring the jury?

MR. BALLARD: Your Honor, my I say one more thing for the record on this, please, sir?

THE COURT: All right.

MR. BALLARD: Thank you, sir. This is a situation I think akin to if Mr. Haskell had chosen not to call Mr. Constant first yesterday the plaintiff wouldn't have been sitting in the room during the trial. The

corporation is entitled under these cases even if the representative is somebody with knowledge to have that person in there.

THE COURT: All right, sir. I am not going to change my ruling. Bring the jury.

MR. BALLARD: Your Honor, on that ground may I move then for a mistrial on the grounds that we do not have our witness here and that the jury is sitting here looking at the two lawyers with nobody representing from the company?

THE COURT: All right, sir. Your motion is denied.

* * * *

[Page 852, lines 9 - 11]:

MR. BALLARD: Thank you, sir. We also have at this time a motion for a new trial based on the following grounds, sir: . . .

* * * *

[Page 853, line 18, through page 854, line 7]:

[MR. BALLARD:] Fifth, Your Honor, we would like to state that a ground for error committed at trial was sequestering the defendant's designated representative, Mr. Moze Salmon, which resulted in the jury not being able to identify with this corporate party and give this corporate party the right to a free and fair trial as all parties are equal before the law, and in preventing Mr. Salmon's presence in the courtroom

which was essential to the presentation of defendant's case. This action has resulted in a violation of defendant's due process rights under the South Carolina and United States Constitutions by making it impossible for the defendant to obtain a fair trial. Another grounds for trial error, sir, is the denial of the defendant's motion for a mistrial based upon the exclusion of Mr. Salmon from participation in the presentation of the case.

* * * *

[Page 857, line 11]:

THE COURT: And your motions are denied.

Supreme Court, U.S.
FILED
NOV 3 1994

No. 94-621

In The

Supreme Court of the United States

October Term, 1994

SPARTANBURG STEEL PRODUCTS, INC.,

Petitioner,

v.

HAROLD E. CONSTANT,

Respondent.

Petition For A Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

IN A STATE IN WHICH THERE IS NO RIGHT TO SEQUESTRATION OF WITNESSES DOES A CORPORATE PARTY REQUESTING DISCRETIONARY SEQUESTRATION HAVE A DUE PROCESS RIGHT TO HAVE AS ITS REPRESENTATIVE A FORMER EMPLOYEE WHO WILL BE A FACT WITNESS IN THE TRIAL?

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STATEMENT OF THE CASE

This slander *per se* action was commenced by Harold Constant on February 1, 1991, against Spartanburg Steel (hereinafter SS). The action was based on an agent of SS falsely accusing Mr. Constant of stealing a welder. SS asserted the truth and qualified privilege as defenses. Trial was held in Spartanburg County before Circuit Court Judge Victor Pyle, Jr., and a jury on November 9-13, 1992.

Before any testimony was heard, SS moved to have all witnesses sequestered. The court granted this motion. On November 10, 1992, SS moved to have the sequestration lifted as to a former employee, Maurice Salmon, claiming him to be the corporation's trial representative, and arguing that by sequestering him, SS, the corporate party, would be excluded from the proceedings. The court denied this motion and asked if SS would like to withdraw its motion to sequester the witnesses. SS declined to withdraw its motion to sequester. The trial court further asked if SS would like to designate its president to be the corporations' representative for trial. Again, SS refused.

On November 13, 1992, the jury returned a verdict for the Plaintiff for $400,000.00 actual damages and $100,000.00 punitive damages. SS moved the court for a judgment notwithstanding the verdict and a motion for a new trial based on several alleged errors of the trial court. SS appealed the trial court's denial of these motions to the South Carolina Supreme Court. In its affirmance of the verdict the Court noted these facts:

> SS fired Mr. Constant for failing to cooperate in its investigation of a missing welding machine.

After independent contractors Clarkson Brothers, Inc. (Clarkson) and Compleat Machine (Compleat) finished working at SS, as was common practice, a welding machine was left on site. At Mr. Constant's direction, the machine was picked up from SS by a Compleat employee. When SS realized the machine had been removed from its property, it began an investigation concerning the removal of the machine. SS asserted the machine belonged to Clarkson. Despite repeated assurances from Clarkson that it was not missing a welding machine, SS continued its investigation during which it contacted the owner of Compleat and communicated respondent was a "thief" and had stolen the machine.

REASONS FOR DENYING CERTIORARI

I. There is no due process right of a corporate party litigant to designate as a courtroom representative a fact witness who at the time of trial, lacks an officer or employment relationship to the corporation, particularly when it seeks discretionary sequestration of witnesses.

The question presented in Spartanburg Steel's Petition for Certiorari does not implicate Spartanburg Steel's right to due process and the Petition should therefore be denied. The issue presented by SS derives from the following facts:

1. There is no right to sequestration in South Carolina trial court procedure. SS moved the trial court for an order of sequestration

which is purely within the sound discretion of the trial court.

2. The trial court granted SS's motion to sequester but would not allow it to designate as its corporate representative at trial a retired individual employee, Maurice Salmon, who was to be a witness in the trial.

3. The trial court gave SS the option to bring in a proper corporate representative or to withdraw its request for sequestration.

SS's effort to invoke the Due Process Clause because of its absence from the courtroom, derives from its own volitional acts in electing to proceed with sequestration which is discretionary, knowing it would result in exclusion of Maurice Salmon, and in selecting former employee Maurice Salmon as its courtroom representative, and refusing the trial court's invitation to designate another individual as its representative from among its officers and employees, or to withdraw its motion.

In its efforts to elevate to constitutional magnitude the issues surrounding Salmon's exclusion from the courtroom pursuant to the sequestration order which was obtained on motion of SS, SS attempts to invoke the Sixth Amendment Confrontation Clause from criminal law; argues a party's right to be present at trial; references "related rights which stem from the right to be present at trial"; argues that a corporation has the same right to be present at trial as an individual, and borrows from Rule 615 Fed. R. Evid. to make the point that a corporation is entitled to be present at trial and the trial court's sequestration of Maurice Salmon deprived SS of that right. All of these arguments notwithstanding, SS has

only raised a question of whether or not a party can circumvent discretionary sequestration by naming as its representative a fact witness with no official relationship with the party. Due process is not implicated.

A. Irrelevancy of Issues Raised by SS

In advancing its due process argument, SS raises the criminal defendant's right under the Sixth Amendment to confront witnesses. Although that right is beyond challenge, SS's reliance upon that right is misplaced, because the Confrontation Clause is by its terms applicable only to criminal prosecutions: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Constitution, Sixth Amendment. See also *Tull v. United States,* 481 US 412 (1986). (Sixth Amendment relates to prosecutions which are strictly criminal in nature). The Sixth Amendment, therefore, has no relation to the case at bar.

From the Confrontation Clause, SS proceeds to argue that a party has "the right to be present in civil cases" calling it "a presumed constitutional right". The right of a party to be present at trial, however, relates only to a part of the election made by SS, at the time of sequestration. SS chose sequestration of witnesses, knowing that its preferred designee would also be excluded and thereafter declined to bring another corporate representative.

The next step in SS's progression involves discussion of rights related to or deriving from the right to be present at trial. Those identified by SS include the right to assistance of counsel; the right to be physically present, competent and to understand; the right to confront witnesses; and the right of a party, the press and the public

of access to trials. Again, while these are all rights which have been recognized as belonging to persons in this country, they have no relation to the decision to exclude Maurice Salmon from the courtroom under the sequestration order and are irrelevant to the Court's consideration of the Certiorari Petition.

SS also argues that a corporate party has the same right to be present at trial as does an individual party.[1] Of course, a corporation has a right to be present. However, SS has cited no authority for the proposition that it has a constitutional right to do so other than through an officer or employee. Unfortunately, SS elected sequestration with full knowledge that Salmon would be excluded. Nevertheless, SS presumes that, since it desired to have Maurice Salmon as its courtroom representative, the court's sequestration of Salmon amounted to exclusion of SS from the courtroom. Manifestly, this was not the case. To the contrary, when Salmon was excluded from the courtroom in accordance with the sequestration order which SS had requested, the trial judge offered SS the opportunity to have someone else be present in the courtroom for the remainder of the trial or to withdraw its motion to sequester. SS declined.

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[1] SS complains that Constant, the plaintiff, remained in court throughout trial and testified as a rebuttal witness. Mr. Constant testified first, so there was no reason for him to be sequestered; and sequestration does not normally apply to rebuttal witnesses. *See U.S. v. Bramlet*, 820 F.2d 851 (7th Cir. 1987).

B. The True Issue: Does a Party who seeks Discretionary Sequestration of Witnesses have a Constitutional Right to have one of its trial witnesses, a former employee, as its Corporate Representative

The South Carolina Supreme Court upheld the sequestration of Salmon because, as a former employee, he was not an appropriate corporate representative.

It is crucial to note that, in South Carolina, which has no state counterpart to Rule 615, Fed. R. Evid., sequestration is not a right but is discretionary with the trial court. *State v. Boyd*, 341 S.E.2d 144 (S.C.App. 1986). "Granting or refusing of a motion to sequester witnesses is within the sound discretion of the trial judge". *State v. Jackson*, 217 S.E.2d 794 (S.C. 1975). Thus, when a corporate party, such as SS makes a motion for sequestration of witnesses, it is entirely up to the trial court whether sequestration should be ordered and upon what grounds. A party in state court has no right, whether constitutional, statutory or otherwise, to have witnesses sequestered.

Consequently, when a corporate party which has requested sequestration is informed that the person designated to be the party's courtroom representative must also be sequestered, since he is a witness who is neither an officer nor an employee, that party is presented with a choice: it may choose sequestration, knowing that it will result in exclusion of the person designated; or, it may withdraw its sequestration request or substitute another representative who would not be subject to sequestration.

Clearly, when a party faces and exercises choices in accepting discretionary sequestration, the party's election

of sequestration, as a volitional act, cannot form the basis for a claimed denial of due process.[2]

Even assuming, arguendo, that sequestration of witnesses is a right, which clearly it is not in South Carolina, SS contends that it, alone, should choose whom it wishes to designate, rather than the trial court or the opposing party.[3] SS attempts to support a virtually unfettered right to designate a representative through two cases from the Maryland Supreme Court which required that a corporation's designee not be excluded under a sequestration order. See *Safeway Stores, Inc. v. Watson*, 562 A.2d 1242 (1989) and *Bobbitt v. Allied-Signal, Inc.*, 639 A.2d 142 (1994). In both *Safeway Stores* and *Bobbitt*, the Maryland Supreme Court rulings allowed for corporate designees who were not, at the time of trial, officers or employees of the corporations in accord with a then existing state rule,

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[2] Even if it was error to exclude defendant's witness, Petitioner did not show any prejudice as a result of the trial court's discretion. In *Morton Buildings, Inc. v. Rezultz, Inc.*, the Court stated that:

> Although the trial court would have been better advised not to sequester both of Rezultz's officers, the error does not compel reversal . . . nothing suggests that Rezultz was prejudiced by its attorney's lack of access to the witnesses.

603 A.2d 951 (N.J. 1992).

In this case Petitioner does not show any prejudice.

[3] While Rule 615 Fed. R. Evid. does make exclusion ordinarily a matter of right, the trial judge still retains a measure of discretion in the application of the exceptions to the rule. *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979).

and not as a result of any constitutional requirement.[4] At the time of decision of both cases, Maryland Rule 2-513 provided *inter alia:*

> (a) Exclusion – On motion of any party made before testimony begins the court shall order that witnesses other than parties be excluded from the courtroom before testifying, and it may do so on its own initiative or on motion of any party made after testimony begins . . . A party that is not a natural person may designate a representative to remain in the courtroom, even though the representative may be a witness . . .

Rule 2-513 was replaced by Rule 5-615 with an effective date of July 1, 1994, and which provides in pertinent part:

> (b) Witnesses not to be Excluded – A Court shall not exclude pursuant to this Rule . . .
>
> (2) An officer or employee of a party that is not a natural person designated as its representative by its attorney.

As part of its consideration of *Bobbitt* the Maryland Supreme Court alluded to the effect of the new Rule in concluding its Footnote 3 "this Rule may restrict the class of persons who may be designated as representatives of a party". These cases offer no support to SS. SS's argument

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[4] The rule against exclusion of a party is not absolute. "An occasion may arise where, to prevent a similarity of statements by witnesses, the court may exclude any witness, *including a party to the litigation,* from the courtroom, but this is a power to be sparingly exercised and only upon the clearest grounds so far as the party is concerned." *In re Christopher A.*, 578 A.2d-1092 (Conn.App. 1990).

would render unconstitutional on its face Maryland's new Rule 5-615 and for that matter Rule 615 Fed. R. Evid. since those rules do not permit the latitude in designation SS contends it has a right to.

Additionally, none of the other cases relating to the designee of a corporation, cited by SS involve a representative who is neither officer nor employee.[5] In fact, cases cited by SS support the position that a corporation's courtroom representatives must be current employees or officers. See *Morton Buildings, Inc. v. Rezultz, Inc.*, 603 A.2d 946 (N.J. 1992) (Holding that "an officer or employee of a corporation who is designated as the corporation's representative may not be sequestered"); and *Dyson v. Ferncliff Properties, Inc.*, 696 S.W.2d 767 (1985). (Rule recognizes exception to sequestration rule for "an officer or employee of a party that is not a natural person designated as its representative by its attorney").

Importantly, Rule 615, Fed. R. Evid., which SS seems to argue should be adopted or followed in South Carolina limits the pool of potential corporate trial representatives in similar fashion:

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[5] Cases that Petitioner cites do not support the proposition that a corporate party may designate a representative who is neither employee nor an officer.

In fact, *Martin v. Burchman*, 203 S.W.2d 807 (Tex. Civ.App. 1947) involves the limited rule that a witness who becomes the wife of a defendant cannot be excluded.

Also, *Jefferson-Western Corp. v. Chefas*, 670 P.2d 431 (Colo. Ct.App. 1983) involves witnesses who were officers of the plaintiff corporation but were not formally designated as representatives, and not a party to the action.

> "This Rule does not authorize exclusion of . . .
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney".

Rule 615, Fed. R. Evid.

Rule 615 has been interpreted as requiring that, in order to be excepted from sequestration, "the representative must be 'an officer or employee of a party which is not a natural person . . . ' ". *Marathon Pipe Line v. Drilling Rig Rowan/Odessa,* 699 F.2d 240, 242 (5th Cir. 1983). See also *Bloudell v. Wailuku Sugar Co.,* 669 P.2d 163, 169 (Haw.App. 1983) n.11.

South Carolina has no codified Rule on sequestration as a counterpart to Rule 615 Fed. R. Evid. Instead, case law provides the Rule. In affirming the trial court's sequestration of Salmon, the South Carolina Supreme Court noted that "[a]t the time of trial, however, Salmon was no longer employed by SS, and therefore was not a proper corporate representative." The rationale supporting this decision is set forth in *Mississippi Rice Growers Ass'n v. Pigott,* 191 So.2d 399 (Miss. 1966) cited by the South Carolina Supreme Court:

> The trial court was of the opinion that since Mr. Kimbriel was no longer an officer in the corporation, he could not represent it in the sense of making decisions or recommendations during the trial of the case, and was, therefore, simply a witness and should be excluded from the courtroom with the other witnesses.

Mississippi Rice Growers Ass'n v. Pigott, at 406.

Mr. Salmon, like Mr. Kimbriel in *Rice Growers* was simply a fact witness. SS wanted Salmon to have the

advantage of hearing the testimony of the other witnesses, an advantage SS took affirmative steps to deny the other trial witnesses.

Neither the Mississippi Supreme Court in *Rice Growers* nor the South Carolina Supreme Court in the case at bar, have invaded any due process rights of the corporate party to be present at trial. Spartanburg Steel proceeded through trial without a representative in the courtroom because SS chose to have no one present if Salmon were excluded.

When a corporate party declines to have any representative present in court because it desires as its representative, a former employee or other individual lacking any present official or employment relationship with the corporation, the lack of a representative is the product of the corporation's choice, rather than any deprivation of due process wrought upon the corporation. In essence, SS chose to have no representative present when Salmon was excluded. A party cannot make a conscious choice on a trial judge's discretionary ruling and then complain of a denial of due process.

CONCLUSION

Spartanburg Steel had no constitutional right to have as its corporate designee a trial witness that lacked officer or employment relationship to the corporation, and was properly excluded by the sequestration it sought.

Respectfully submitted,

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